APPEAL NO. 93391

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8301-1.10 *et seq.* (Vernon 1993) (1989 Act). A contested case hearing was held in (city), Texas, on April 22, 1993, with (hearing officer) presiding. The issue at the contested case hearing was whether the respondent (claimant herein) had reached maximum medical improvement (MMI), and if so, when had he done so. The hearing officer found that the claimant had not reached MMI. The appellant (carrier herein) files a request for review arguing that the issue of MMI was not timely raised and, in the alternative, that the designated doctor selected by the Texas Workers' Compensation Commission (Commission) had certified MMI. The claimant responds contending that the issue of MMI was properly before the hearing officer and the designated doctor had not certified MMI because his finding of MMI was conditional.

DECISION

Finding no reversible error in the record, and sufficient evidence to support the decision of the hearing officer, we affirm.

The facts of this case are mostly undisputed. The claimant alleges, and the carrier concedes, he suffered a compensable injury to his low back on (date of injury). It is uncontested that the claimant's treating doctor, (Dr. H), certified on a Report of Medical Evaluation (TWCC-69) that the claimant had reached MMI on June 3, 1992, with whole body impairment of 24%. On his TWCC-69, Dr. H comments that he does "not feel the patient will be able to return back to heavy type of manual labor" and states "I do feel he could benefit from weight loss program since the patient has gained weight from inability to perform exercise because of back injury." Dr. H recommends on the TWCC-69 a weight loss program with (Dr. T).

In a letter to the Commission dated July 1, 1992, the carrier states that it does not agree with the impairment rating assessed by Dr. H, and states that it will pay impairment income benefits (IIBS) at a "5% whole body rating pending resolution of this matter." In response to this letter the Commission chose (Dr. M), an orthopedic surgeon, as the designated doctor to determine impairment.

On October 1, 1992, the claimant saw Dr. M, who on a TWCC-69 certified MMI as of October 1, 1992, and assessed a whole body impairment rating of seven percent. Dr. M states his narrative report of October 1, 1992:

> I believe that a discographic evaluation of the patient's L3, L4 and L5 intervertebral discs would definitely localize the pain either to the L5 level or show that the L5 intervertebral disc is not painful in and of itself.
>
> Mr. S does not wish to undergo any form of treatment options such as a discogram or further investigatory studies. For this reason, I believe the patient has

> reached maximum medical improvement and carries an impairment rating of 7% as established by the AMA Guides to Evaluation of Permanent Impairment, Third Edition. He will return to the office on an as needed basis only.

In a letter dated October 15, 1992, the claimant's counsel states that the claimant in light of his medical situation is "in fact willing to undergo further testing" and asks Dr. M in light of this whether Dr. M still believes that the claimant has reached MMI. In his response dated October 22, Dr. M states:

> [A]t this time the impairment rating as given of 7% is based on the AMA Guides to Evaluation of Permanent Impairment. If [the claimant] wishes to undergo further investigatory studies such as a lumbar discogram then he has not reached maximum medical improvement until completion of that study and final decision can be made regarding treatment options.

The claimant testified that he attempted on four occasions to make an appointment to see Dr. M, but that the carrier refused to authorize a visit with Dr. M. The claimant testified that this refusal continued after Dr. H had referred him in writing to Dr. M at the claimant's request. When asked at the hearing by the carrier why he did not go to Dr. M "on his own," the claimant stated since the carrier had not paid him any benefits in over five months he was unable to afford to pay to see Dr. M.

The claimant contended at the hearing that there had not been any proper certification of MMI because both the MMI dates of Dr. H and Dr. M were conditional. Claimant alleges that Dr. H's finding of MMI was conditioned upon the claimant's undergoing a weight management program. Claimant testified the carrier had denied his admission to several weight loss programs, and therefore, he had never undergone weight loss treatment. He did testify that he had attempted to lose weight on his own but had not been successful.

Claimant argues that Dr. M's certification of MMI is conditional in that Dr. M found MMI only if the claimant refused to undergo a discogram. The claimant testified that when Dr. M first mentioned the discogram, the claimant thought that the doctor was definitely recommending surgery and the claimant declined to have any surgery. The claimant testified he is willing to have the discogram done, and in fact with the pain he is now experiencing, is willing to submit to surgery.

The carrier argues that the issue of MMI was not properly before the contested case hearing officer because neither party contested Dr. H's certification of MMI within 90 days, the carrier only having contested the impairment rating assessed by Dr. H. The carrier argues that this certification thus became final after 90 days, and the hearing officer erred in considering this issue. The carrier argues in the alternative that if certification of MMI was properly in issue then all the medical evidence supports finding that the claimant has

reached MMI as both the treating and designated doctors have certified MMI.

The hearing officer in her discussion of the issue as to whether MMI is properly before her references Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992, and Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. The carrier in its request for review argues that these cases are distinguishable from the case at bar. We do not need to examine the arguments concerning the applicability of these decisions to the present case because we have recently decided another case which squarely decides the contested issue. In Texas Workers' Compensation Commission Appeal No. 93377, decided July 1, 1993, we held that where the impairment rating is timely disputed, there is no basis to determine that the underlying certification of MMI has become final. As we stated in Appeal No. 93377, *supra*:

> The pertinent Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) provides that the first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. While the rule does not expressly refer to MMI, this panel has held that it would be inconsistent to interpret the rule to bind a claimant or carrier to the percentage of impairment yet allow an "end run" around this finality through the open-ended possibility of an attack on MMI. *See* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Thus a carrier or claimant who disagrees either with the first impairment rating, or the finding of MMI on which it was based, must make known such dispute within the 90 days required by the rule; a failure to timely dispute one element renders both final, as impairment and MMI have been held to be intertwined for these purposes.
>
> This case, of course, involves a situation where the carrier timely disputed impairment only. Applying the same logic by which we determined that in the absence of any timely dispute MMI and impairment either become final together, or not, it appears to us that if the first impairment rating has not become final because of timely dispute, it would follow that, under Rule 130.5(e), there is no basis to determine that MMI has become final. As we stated in Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993, in which the failure to timely dispute impairment made that rating final as well as the certification of MMI, "[a]s noted in Appeal No. 92670, *supra*, MMI and impairment rating become intertwined in applying the provisions of Rule 130.5."

In the present case, just as in Appeal No. 93377, *supra,* the carrier timely disputed impairment only and argued that MMI had become final because it was not timely disputed by either party. We find Appeal No. 93377, *supra,* controlling in the present case and, consequently, we hold that the hearing officer was correct in ruling that the issue of MMI

was before her. *See* Appeal No. 93377, *supra,* and citations therein.

This brings us to the issue as to whether or not MMI was certified in the present case. The carrier submits that MMI has been certified by the designated doctor; the claimant argues that there has been no certification because the certification was conditioned on the claimant's initial refusal to undergo testing which the claimant retracted, and which testing, now desired by the claimant, the carrier has blocked by refusing to authorize.

We have addressed similar issues in cases in which the finding of MMI was contingent upon the claimant not having surgery. Thus in Texas Workers' Compensation Commission Appeal No. 93293, decided June 1, 1993, where the designated doctor said that without surgery the claimant had reached MMI, and where the claimant was considering surgery but desired the opinion of another doctor, with whom he had already scheduled an appointment, we reversed the hearing officer who had found MMI based upon the certification of the designated doctor and remanded to allow the claimant to obtain the other opinion regarding surgery and to then allow the designated doctor to review this report. Also, in Texas Workers' Compensation Commission Appeal No. 93336, decided June 16, 1993, we reversed a finding of MMI by the hearing officer based upon certification by the designated doctor where after the certification had taken place the Commission's medical review division had ordered the carrier to pay for surgery. In Appeal No. 93336, *supra*, we remanded the case to allow the hearing officer to "determine whether (and, if so, to what degree) the designated doctor's opinion on MMI and impairment may have changed because of surgery."

An underlying rationale of these cases is also consistent with our previous rulings that a designated doctor may amend a finding of MMI. *See* Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992; Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993; Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993; Texas Workers' Compensation Commission Appeal No. 93328, decided June 2, 1993. We believe that this same underlying rationale applies to the present case. Here Dr. M certified MMI conditioned upon the claimant's desire not to undergo any further investigatory studies. When informed by letter from the claimant's counsel that the claimant was "in fact willing to undergo further testing," Dr. M essentially amends his finding of MMI stating "he [the claimant] has not reached maximum medical improvement until completion of that study. . . ." As amended, the opinion of the designated doctor is that MMI has not been reached.

For the foregoing reasons, the decision of the hearing officer is affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge